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Miscellaneous No. 345, October Term 1947,

now

Miscellaneous No. 1, October Term 1948.

In the Supreme Court of the United States

GRACE W. ADKINS AS ADMINISTRATRIX OF THE
ESTATE OF P. V. ADKINS, DECEASED,

Petitioner,

vs.

E. I. DU PONT DE NEMOURS & COMPANY, INC.,
Respondent;

THE UNITED STATES OF AMERICA, Intervener.

BRIEF OF E. I. DU PONT DE NEMOURS & CO., INC.,
RESPONDENT.

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*Respondent;***

THE UNITED STATES OF AMERICA, *Intervener.*

**BRIEF OF E. I. DU PONT DE NEMOURS & CO., INC.,
RESPONDENT.**

Statement.

We believe that a brief statement concerning the proceedings had in the trial court would be of assistance to this Court.

P. V. Adkins, now deceased, commenced this action in the United States District Court for the Northern District of Oklahoma under the Fair Labor Standards Act of 1938, to recover for alleged overtime and liquidated damages

claimed to be due for work, labor and services rendered to respondent in what is commonly known as the Oklahoma Ordnance Works near Choctaw, Oklahoma, for the production of munitions of war. In the original action there were approximately 650 claimants.

P. V. Adkins, as agent of this group of claimants, after the original action had been pending for some time, and after consultation with the judge of the trial court, decided to take a cross-section of twelve claimants who worked in different departments of the Oklahoma Ordnance Works, and make a test case of the various issues involved in these several cases. This was accordingly done. This cause came on before a special master. A large amount of proof was introduced comprising seven typewritten volumes. The special master, after hearing the evidence, argument of counsel, together with written briefs, made findings of fact, conclusions of law, and his recommendations to the trial court. The special master concluded that under the doctrine of *de minimis non curat lex* and the doctrine of non-retroactivity the plaintiffs could not recover and recommended their claims be denied. Both plaintiffs and respondent filed objections to the report of the special master. Before this report of the special master came on for hearing the Portal-to-Portal Act of 1947 was passed and approved by the President of the United States. The respondent set up in an amendment to its answer that the Portal-to-Portal Act of 1947 barred the plaintiffs in this cause and prayed that the action be dismissed at the cost of the plaintiffs.

The plaintiff, P. V. Adkins, died and his wife as administratrix was substituted as party plaintiff. Plaintiff countered with an attack on the constitutionality of the Portal-to-Portal Act of 1947. The United States Government, on account of the attack on the constitutionality of

the Portal-to-Portal Act of 1947, was permitted to intervene. Briefs were filed, and when the cause came on for argument the trial court held that the Portal-to-Portal Act of 1947 was constitutional and dismissed the action on the ground that the trial court was without jurisdiction to proceed further except to dismiss the action. (Appendix, page 29.) This action was based solely on the Fair Labor Standards Act of 1938. The plaintiff gave notice of her intention to appeal to the Circuit Court of Appeals for the Tenth Circuit and then requested the trial court to require respondent to pay the cost of making up the record on appeal. Plaintiff sought to include in the record on appeal not only all of the pleadings, but likewise the briefs, the evidence taken before the special master, the special master's report, and any and all papers in connection with the case, notwithstanding the fact that the report of the special master had never been passed on by the trial court. In effect, counsel for plaintiff are seeking to force respondent to pay for a tremendous record, which alone the trial court must consider in the event this Court holds that the trial court was in error in holding the Portal-to-Portal Act of 1947 constitutional and dismissing the case. Both the trial court and the Circuit Court of Appeals for the Tenth Circuit denied the application of the plaintiff to appeal *in forma pauperis*.

We believe that it is essential to any discussion of the issues involved herein that this Court have before it certain portions of the record in the trial court. We have accordingly caused to be printed, and submit herewith, an appendix of the pleadings and the judgment of the trial court. We ask that this appendix be considered as a part of the record in this Court.

Counsel for petitioner assert in their brief, page 1, that

this action was based on contract. We take issue with that statement and ask the Court to refer to the original complaint filed in this cause (Appendix, page 1). It was based solely on the Fair Labor Standards Act of 1938.

On page 2 of their brief counsel for petitioner assert that the court allowed the special master \$9,000.00. This is in error. It was \$6,000.00. (See Appendix, page 34.)

Counsel for petitioner further assert that the cost of the record on appeal would be around \$4,000.00. We have set out in our appendix what we consider essential to review any alleged error of the trial court in passing upon the constitutionality of the Portal-to-Portal Act of 1947, holding the same constitutional and dismissing the cause in the trial court. The cost of appeal in this case on the essential portions of the record is nominal. We are at a loss to understand why counsel for petitioner seeks to include in a record on appeal matters which have never been passed upon by the trial court. They are simply attempting to reduce the Circuit Court of Appeals to the status of a trial court of first instance, and to place a useless burden of expense on the Federal Government.

We have examined the brief submitted by counsel for petitioner very carefully and we believe it is wholly without merit, and on the brief for petitioner alone, the application for certiorari should be denied.

ARGUMENT.

The essential issue involved in this proceeding is whether or not the petitioner and the claimants she represents are entitled to appeal from the United States District Court for the Northern District of Oklahoma to the Circuit Court of Appeals of the Tenth Circuit *in forma pauperis*. The questions of law presented may be analyzed under the following proposition:

THE PETITIONER HEREIN AND LITIGANTS WHOM SHE REPRESENTS ARE NOT ENTITLED TO APPEAL *IN FORMA PAUPERIS*.

- (a) Petitioner and litigants for whom she prosecutes this action have not brought themselves within the terms of Title 28, F. C. A., Section 832, providing for appeals *in forma pauperis*;
- (b) Any contract between attorney and client or clients under the Fair Labor Standards Act of 1938, which provides that the attorney, or attorneys, may as a part of their fees, share in any part of the recovery, except a reasonable attorney's fee to be fixed by the court, is void as against public policy.
- (c) Under the provisions of Title 29, F. C. A., Section 216, the attorney's fee provided for is contingent upon recovery of a judgment on behalf of the plaintiff, or plaintiffs, and before an appeal can be taken *in forma pauperis*, the attorney, or attorneys, must bring themselves within the terms of Title 28, F. C. A., Section 832, *supra*.

We will discuss these subdivisions of our proposition in the order named.

(a) Petitioner and litigants for whom she prosecutes this action have not brought themselves within the terms of Title 28, F. C. A., Section 832, providing for appeals *in forma pauperis*.

The Court should bear in mind that the twelve persons who appeared as plaintiffs in this cause in the trial court, now represented in this application by the administratrix as petitioner, are not the only ones directly interested in this proceeding. Counsel for petitioner in the petition for certiorari herein, page 2, admit that, including the twelve plaintiffs in this cause, there are 650 claimants represented by them in this cause and in cause No. 1720 Civil in the United States District Court for the Northern District of Oklahoma.

Petitioner has made as a part of her application for certiorari as Exhibit A attached thereto, the second application filed in the Circuit Court of Appeals for the Tenth Circuit, asking leave to appeal *in forma pauperis*. The Circuit Court of Appeals denied this second application. The petitioner now asks this Court to review and reverse the ruling of the Circuit Court of Appeals refusing to authorize an appeal *in forma pauperis*. In the second application, addressed to the Circuit Court of Appeals for the Tenth Circuit, petitioner made the following admissions:

"One of the persons whose wage-hour claim is involved in this case, namely, V. J. Blevins, refuses to advance or secure the costs of this appeal and refuses to execute an affidavit *forma pauperis* therefor, with the assertion by him that, 'I guess you will have to go on without me,' * * * "

The affidavit made by petitioner's counsel, John W. Porter and John W. Porter, Jr., which is attached to peti-

titioner's second application to appeal *in forma pauperis* as a part of Exhibit A-1, is as follows:

"Jno. W. Porter and John W. Porter, Jr., each of lawful age and being first duly sworn upon oath, state: We are the sole members of the law firm of Porter & Porter which is a law partnership with offices at 630 Equity Building in Muskogee, Muskogee County, State of Oklahoma, and each of us is a citizen of said city, county and state and also a citizen of the United States of America. Said law firm is the counsel of record in and representing the plaintiff in the above entitled and numbered action, wherein plaintiff is trying to appeal *in forma pauperis* from an adverse decision of the trial court therein. The clerk's office of said court has estimated that the costs of such appeal will be around \$4000. Plaintiff's cause of action in said cause is for the recovery of unpaid wage-hour claims and damages by reason of certain labor employments consummated at what is known as the Oklahoma Ordnance Works near Pryor, Oklahoma, all as more particularly appears in the record of this case, and we feel that said cause of action is meritorious and that plaintiff should recover. The total liquid assets of said law firm does not exceed \$2000, and even though said law firm accepted employment as counsel for plaintiff in this case, it has always been true and yet is that the said John W. Porter, Jr., has done and is expected to do substantially all of the work done or contemplated by said employment, and for that reason the said Jno. W. Porter and said law firm have waived and assigned to the said John W. Porter, Jr., all of any right, title and interest that may ever become due or payable to said law firm or said Jno. W. Porter or either of them by reason of said employment or by reason of any work done or contemplated by them or either of them concerning this case. The said Jno. W. Porter and said law firm and each of them now reaffirms said waiver and assignment, and the said John W. Porter, Jr., has accepted said waiver and

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assignment and now reaffirms such. The said John W. Porter, Jr., has all of the right, title and interest in and to any and all fees and considerations that may ever be due or payable by reason of said employment of counsel or plaintiff in said action and prosecuting said cause, but because of his poverty the said John W. Porter, Jr., is unable to pay or give security for said costs of appeal and still be able to provide himself and his dependents with the necessities of life. * * *

It will be observed that this is a mere subterfuge between counsel for petitioner, because John W. Porter, Sr., did not make an affidavit that he could not furnish the costs or the necessary security for costs. We deem it unnecessary to discuss this affidavit further. It is definitely not in compliance with Title 28, F. C. A., Section 832.

In view of the admissions made by counsel in the second application to the Circuit Court of Appeals to appeal *in forma pauperis*, there was nothing else for the Circuit Court of Appeals to do except deny the application.

The principle is well settled that,

"The affidavit of an administratrix who is suing for damages for the wrongful death of her husband, must show that neither the estate nor the beneficiaries of the action are able to prepay or secure the costs."

—*Clay v. Southern R. Co.*, (C. C. A. 6) 90 Fed. 472;

Reed v. Pennsylvania Co., (C. C. A. 6), 111 Fed. 714;

Boggan v. Provident Life & Acc. Ins. Co., (C. C. A. 5) 79 F. (2d) 721.

We believe that this record clearly discloses that the petitioner, the attorneys and plaintiffs interested in the prosecution of this cause wholly fail to bring themselves within the terms of Title 28, F. C. A. Section 832, relating to appeals *in forma pauperis*, and the order of the Circuit

Court of Appeals denying both applications should be affirmed and the petition for certiorari denied.

We come now to consider our second subdivision.

(b) Any contract between attorney and client or clients under the Fair Labor Standards Act of 1938, which provides that the attorney, or attorneys, may as a part of their fees, share in any part of the recovery, except a reasonable attorney's fee to be fixed by the court, is void as against public policy;

We endeavored to procure a copy of the contract between counsel for petitioner and the various plaintiffs in this cause, but counsel for plaintiffs refused to furnish us a copy of their contract. (Appendix, pages 35, 36, 37). We are unable to say whether the contract between counsel for petitioner and plaintiffs in this cause whom she represents, is contingent or otherwise. We assume that it is contingent or counsel would not refuse to furnish counsel for respondent with a copy.

We are definitely of the opinion that any contract between an attorney and client for attorneys' fees in the prosecution of a claim under the Fair Labor Standards Act of 1938, Title 29, F. C. A., Section 216, by the terms of which the attorney is to receive any part of the recovery of the claimant under the Fair Labor Standards Act, is void as against public policy. The provision in the Act covering attorneys' fees, Title 29, F. C. A. Section 216; we here quote:

"* * * The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

We note that the statute specifically provides that in such action, in addition to any judgment awarded the plain-

tiff, or plaintiffs, that the court is to allow a reasonable attorneys' fee. The language is too clear to need a lengthy discussion. The purpose of the Act is to protect the laborer, so that whatever he recovers in case of recovery would be net to him, or to her, as the case may be.

This Court, so far as we are able to ascertain, has never passed directly on the question of whether a contingent contract between attorney and client under the Fair Labor Standards Act is void or valid.

In the case of *Sykes v. Lochman*, (Kan.) 132 P. (2d) 620, the Kansas Supreme Court had under consideration the construction of the Fair Labor Standards Act of 1938. From this case we quote the sixth paragraph of the syllabus:

“The section of the Fair Labor Standards Act providing that the court shall in addition to any judgment awarded plaintiffs allow a reasonable attorney's fee contemplates that an employee shall receive full amount of any award made to him, and any contract that would allow an attorney any part of the award made to any employee would be void.”

Petition for writ of certiorari was filed in this Kansas case and denied, 319 U. S. 753, 87 L. ed. 1707.

The fact that this Court denied a petition for certiorari in the *Sykes v. Lochman* case, *supra*, was, we consider, tantamount to a holding that a contract between an attorney and client in a contingent portion of the client's recovery under the Fair Labor Standards Act, is against public policy and void.

In the case of *Harrington v. Empire Const. Co.*, (C. C. A. 4) 167 F. (2d) 389, the court had under consideration the construction of the Fair Labor Standards Act. One question was as to whether an attorney could take the full

amount of the fee fixed by the court where the claimants were successful, and then require the claimants to pay an additional fee to the attorney by special contract. In discussing the question the court in the fourth paragraph of the syllabus states:

"In an action by an employee under Fair Labor Standards Act wherein an allowance is made of attorney fees, court has sufficient control over attorney as an officer of court to require him to surrender any claim he may have for an additional fee under a private agreement as a condition of receiving fee allowed by judgment of court. Fair Labor Standards Act of 1938, Sec. 16, 29 U. S. C. A., Sec. 216."

And in the body of the opinion the court says:

"It is true that the statute does not forbid the attorney to make a private agreement with his client nor forbid an employee to compensate his attorney in case the suit is unsuccessful; but it seems to us too clear for argument that Congress did not intend the court to fix a fee sufficient to compensate the plaintiff's attorney for all of his services and to permit him to collect an additional fee from his client under a private agreement. Such an arrangement would require the cooperation of the court in the frustration of the Congressional purpose. * * *"

This Court in the case of *Brooklyn Savings Bank v. O'Neil*, 324 U. S. 697, 89 L. ed. 1296, which was consolidated with two other cases, *Dize v. Lake Maddrix*, and *Arsenal Building Corporation and Spear & Co., Inc., v. Meyer Greenburgh*, had under consideration the construction of certain provisions of the Fair Labor Standards Act of 1938, 29 U. S. C. A., Section 216, which contains among others the following provision:

"* * * shall be liable to employee or employees af-

fected in the amount of their unpaid minimum wages or their unpaid overtime compensation as the case may be, and in an additional equal amount as liquidated damages."

Questions were raised by the litigants as to the right of an employee subject to the terms of the Act to waive or release his right to receive from the employer liquidated damages under Section 16-B, and likewise whether an employee is entitled to interest on sums recovered as wages and liquidated damages under that section.

These consolidated cases were thoroughly briefed and argued to this Court by numerous able lawyers. The court, speaking through Mr. Justice REED, used the following language:

"It has been held in this and other courts that a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy. * * * Where a private right is granted in the public interest to effectuate legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate.

* * * * *
"The legislative history of the Fair Labor Standards Act shows an intent on the part of Congress to protect certain groups of the population from sub-standard wages and excessive hours which endangered the national health and well-being and the free flow of goods in interstate commerce. The statute was a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required Federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency and as a result the free movement of goods in interstate com-

merce. To accomplish this purpose standards of minimum wages and maximum hours were provided. Neither petitioner nor respondent suggests that the right to the basic statutory minimum wage could be waived by any employer subject to the Act. No one can doubt but that to allow waiver of statutory wages by agreement would nullify the purposes of the Act. We are of the opinion that the same policy considerations which forbid waiver of basic minimum and overtime wages under the Act also prohibit waiver of the employee's right to liquidated damages.

"We have previously held that the liquidated damage provision is not penal in its nature but constitutes compensation for the retention of a workman's pay which might result in damages too obscure and difficult of proof for estimate other than by liquidated damages. *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572; 86 L. ed. 1682, 62 S. Ct. 1216. It constitutes a Congressional recognition that failure to pay the statutory minimum on time may be so detrimental to maintenance of the minimum standard of living 'necessary for health, efficiency, and general well-being of workers' and to the free flow of commerce, that double payment must be made in the event of delay in order to insure restoration of the worker to that minimum standard of well-being. Employees receiving less than the statutory minimum are not likely to have sufficient resources to maintain their well-being and efficiency until such sums are paid at a future date. The same policy which forbids waiver of the statutory minimum as necessary to the free flow of commerce requires that reparations to restore damage done by such failure to pay on time must be made to accomplish Congressional purposes. Moreover, the same policy which forbids employee waiver of the minimum statutory rate because of inequality of bargaining power, prohibits these same employees from bargaining with their employer in determining whether so little damage was suffered that

waiver of liquidated damages is called for. This conclusion is in accord with decisions of the majority of the Federal courts that have considered this question."

After discussing the public policy of the Fair Labor Standards Act in detail this Court held:

"Neither the right of an employee under the Federal Fair Labor Standards Act of 1938 to the basic statutory minimum wage nor to statutory liquidated damages for its nonpayment can be waived by him."

And likewise held that the employee is not entitled to interest on sums recovered for minimum wages and liquidated damages under the Fair Labor Standards Act.

By the plain and unambiguous terms of the Act a reasonable attorney's fee is provided for the attorney for the claimant if he succeeds in establishing his or her claim. As construed by this Court in *Brooklyn Savings Bank v. O'Neil, supra*, it was the policy and intention of Congress that the claimant should be protected in the interest of public welfare. Claimant cannot waive the basic statutory minimum wage nor the statutory liquidated damages as against the employer for non-compliance with the Act. If the claimant under the Fair Labor Standards Act cannot waive the provisions of the Act providing for minimum wages and liquidated damages, by the same excellent reasoning the claimant cannot waive the provisions relating to attorney's fees, and any attempt on part of attorney or client by contract or otherwise to waive or change such provision is against public policy and void.

It is respectfully submitted that any contract between attorney and client under the Fair Labor Standards Act, in which it is agreed between attorney and client that in case of recovery under the Fair Labor Standards Act the

attorney is to have any part of the recovery in favor of the claimant, is to that extent void as against public policy and of no force and effect.

We come now to consider our third contention:

(c) Under the provisions of Title 29, F. C. A., Section 216, the attorney's fee provided for is contingent upon recovery of a judgment on behalf of the plaintiff; or plaintiffs, and before an appeal can be taken *in forma pauperis*, the attorney, or attorneys, must bring themselves within the terms of Title 28, F. C. A., Section 832, *supra*.

As above noted, we have been unable to procure a copy of the contract between petitioner, and claimants or plaintiffs whom she represents, and attorneys for petitioner. Any attorneys' fee recovered by attorneys for petitioner and the litigants represented by her in this action are contingent on this: That before such attorneys can recover any compensation they must win the case for petitioner and those for whom she is acting as agent, otherwise attorneys for petitioner cannot recover any attorneys' fees in this action.

"'Contingent' means liable to occur, and designates an event which may occur, or expresses the quality of being casual, or the possibility of coming to pass; it includes all anticipated future events which are not certain to occur, and possibilities which prudent men know may happen, though there may not necessarily be known indications of them apparent."

—*Scot v. City of Jamestown*, 217 N. W. 668, 56 N. D. 454.

"'Contingent' is the quality of being casual; the possibility of coming to pass; an event which may occur; a possibility; a casualty. All anticipated future events which are not certain to occur are 'contingent' events, and may be properly denominated mere 'pos-

sibilities,' more or less remote, while anticipated events which are certain to occur, or must necessarily occur, are in no degree 'contingent'."

—*Verdier v. Roach*, 96 Cal. 467, 31 Pac. 554, 556.

* The right of an attorney who represents a claimant under the Fair Labor Standards Act is clearly contingent upon recovery, and being contingent, in order to appeal *in forma pauperis* under Title 28, F. C. A., Section 832, it is necessary that all interested parties make affidavits; as required by said statute, showing their inability to make a cash deposit or secure the necessary costs, and in addition thereto that they have a meritorious claim on appeal.

Here we have a case where one of the attorneys who appears for petitioner in this cause has neglected and failed, and still neglects and fails, to come forward and make the affidavit as prescribed by Title 28, F.C.A., Section 832, page 520, in order to appeal *in forma pauperis*. Such conduct is non-compliance with the statute. We quote:

"The sworn statement required by this section must show that plaintiff is a citizen and that there is no person interested who is able to pay or secure the costs. Counsel taking suits on a contingent basis should be made responsible for costs, and should also make affidavit of inability. *Boyle v. Great Northern R. Co.*, (C. C. Wash.) 63 Fed. 539; *Feil v. Wabash R. Co.*, (C. C. Mo.) 119 Fed. 490; *Phillips v. Louisville & N. R. Co.*, (C. C. Ala.) 153 Fed. 795; *Esquibel v. Atchison, T. & S. F. R. Co.*, (D. C. N. M.) 206 Fed. 863; *U. S. v. Ross*, (C. C. A. 6) 298 F. 64, 33 A. L. R. 728; *Bennington*, (D. C. Ohio) 10 F. (2d) 799; *Chetkovich v. U. S.*, (C. C. A. 9) 47 F. (2d) 894; *DeHay v. Cline*, (D. C. Tex.) 5 F. Supp. 630. Contra, *U. S. v. Call*, (C. C. A. 5) 287 Fed. 520; *Clark v. U. S.*, (D. C. Mo.) 57 F. (2d) 214, overruling 47 F. (2d) 894; *Deadrich v. U. S.*, (C. C. A. 9) 67 F. (2d) 318. Aff'd, 74 F. (2d) 619; *Quittner v. Motion*

Pictures Producers & Distributors of America, Inc., (C. C. A. 2) 70 F. (2d) 331." (28 F. C. A., Sec. 832, p. 520.)

"Under the statute the affidavit as to the poverty of the applicant is to be made by himself, and not by another, even his counsel. A supporting affidavit may properly be made by the counsel, but the importance that he who is seeking the privilege accorded by the statute should be required to expose himself to the pains of perjury in a case of bad faith is plain."

—Pothier v. Rodman, 261 U. S. 307, 67 L. ed. 670.

It thus appears that since the claim of counsel for petitioner for compensation is contingent upon recovery of petitioner and those for whom she acts as agent, each counsel for petitioner must make an affidavit that he is not able to put up the necessary costs or give the necessary security for costs of an appeal to come within the provisions of Title 28, F. C. A., Section 832, regulating appeals *in forma pauperis*.

In conclusion; it is respectfully submitted that the petitioner has failed to point out on behalf of the plaintiffs that she has a meritorious right of appeal; that she has wholly failed to bring herself and those for whom she acts within the terms of the statutes providing for appeal *in forma pauperis*; that any contract between an attorney and client under the Fair Labor Standards Act which provides that the attorney may receive as his compensation any part of the recovery by the claimant, is against public policy and void; that attorneys' fees under Title 29, F. C. A., Section 216, are contingent upon recovery, and in order for a plaintiff or plaintiffs to appeal *in forma pauperis* the attorneys must join with their client in making affidavits in order to bring themselves within the terms of the statute providing for appeals by poor persons; that this application

for certiorari should be denied and dismissed at the cost
of the petitioner.

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